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IN THE

Supreme Court of the United States

OCTOBER TERM 1962

No. 336

L. K. PETERSON,
CREDIT FINANCE COMPANY,
CONGRESS INVESTMENT COMPANY, INC.
AND ALAMO FINANCE COMPANY, INC.

Petitioners,

v.

HERBERT E. THARP,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF OF RESPONDENT HERBERT E. THARP IN OPPOSITION

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In The

Supreme Court of the United States

October Term 1962

No. 336

L. K. Peterson,
Credit Finance Company,
Congress Investment Company, Inc.
and Alamo Finance Company, Inc.
Petitioners,

v.

Herbert E. Tharp,
Respondent.

On Petition For A Writ of Certiorari to
the United States Court of Appeals
for the Fifth Circuit.

BRIEF OF RESPONDENT HERBERT E. THARP IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals is reported in 299 F. 2d 434 and is printed in full as Appendix A to the Petition. The District Court's opinion appears in 202 F. Supp. 80 and is printed as Appendix B to the Petition.

JURISDICTION

This Court is without jurisdiction, the petition for writ of certiorari not having been filed within the period allowed by law. Title 28, United States Code, Sec. 2101(c), appended hereto as Appendix A.

QUESTIONS PRESENTED

1. Whether a managing partner, who has defrauded his absentee partner, may assert the illegality of some of the transactions of the partnership (lending of money at usurious rates) and defeat a suit for an accounting by the absentee partner, thereby permitting the fraudulent partner to reap the benefits of his own fraud and breach of fiduciary duty, where the partnership agreement was legal upon its face, the transactions have become accomplished facts, and the court, in order to do equity between the partners, was not required to enforce or examine into such transactions.

2. Whether a managing partner, who has violated his fiduciary obligation to his absentee partner by organizing competing companies solely owned by the managing partner and by financing and establishing such competing companies by fraudulently transferring assets, customers and personnel of the partnership thereto, may, seven days after suit is filed by absentee partner for an accounting, terminate such partnership and, by reason of such termination, retain all profits of such competing companies accruing during the three and one-half year pendency of such suit, and be made to disgorge and share with the absentee partner only those profits which had accumulated prior to the date of such termination.

3. Whether the Supreme Court, in the absence of a conflict between decisions or other showing of public importance of issues involved, should review the evidence and findings and conclusions of the District Court, sitting without a jury, concurred in by the Court of Appeals, to determine a fact question as to knowledge by Tharp in December, 1953, of liquidation and diversion of partnership business, particularly in the light of the failure of Petitioners to point out to the Court the consequences of such knowledge.

4. Whether the Supreme Court, in the exercise of its power of supervision, should review the evidence, findings and conclusions of the District Court, sitting without a jury, concurred in by the Court of Appeals, to determine a mixed question of law and fact as to the correctness of an award for damages in a suit for an accounting which was based upon the report of a special master made pursuant to directions of the District Court.

COUNTERSTATEMENT OF THE CASE

This is a diversity case and arose as a suit for an accounting by an absentee partner, Herbert E. Tharp, against his managing partner, L. K. Peterson and certain corporate defendants wholly owned by Peterson. The complaint sounded in fraud and breach of fiduciary obligations and was tried to the District Court without a jury, and resulted in a judgment for Tharp against Peterson and the companies owned by him for the sum of $82,607.42, and, on appeal to the United States Court of Appeals for the Fifth Circuit, the judgment was affirmed.

Tharp and Peterson operated several loan companies under a written partnership agreement, with Peterson managing the companies in Houston, Texas, and Tharp operating certain companies owned by the partnership in Birmingham, Alabama. As of December 31, 1952, the partners agreed upon a swap-out whereby Tharp acquired the Birmingham properties, and Peterson became the owner of the Houston companies, with the exception of Model Investment Company in Houston, Texas which continued to be operated under the partnership agreement under the supervision and control of Peterson.

On September 8, 1960, the trial court entered an interlocutory judgment in which he found that Peterson had breached his fiduciary duty to Tharp and diverted partner-

ship business and assets to himself and to his own corporations, and that such action and conduct of Peterson constituted actual fraud upon Tharp. The Court adjudged that Tharp was entitled to recover twenty-five percent of all profits and assets received by Peterson and the corporate defendants resulting from the operation of the small loan businesses; that there should be a dissolution, liquidation and distribution of the partnership's business and assets; and that an auditor should be appointed to effect an accounting between the parties. The Court also set forth a formula for fixing the amount of compensation due Peterson for management. Peterson was also to be given full credit for all capital sums invested by him in his own corporations.

The auditor's report was filed and, with minor exceptions, the defendants' objections thereto were overruled and denied. The District Court made full findings of fact and conclusions of law and the Court of Appeals, in affirming, found that the findings were fully supported by the evidence and the conclusions correct in law.

ARGUMENT

This cause was argued and submitted on November 16, 1961. The opinion and judgment of the United States Court of Appeals for the Fifth Circuit was rendered on February 1, 1962, and all counsel of record were advised of the opinion by form letter from the Clerk on the same date. A timely petition for rehearing was filed by L. K. Peterson, et al., (petitioners here) and the order of the Court of Appeals denying said petition was duly entered on March 15, 1962. Through inadvertence, the form letter advising counsel of the action of the Court of Appeals (while being mailed on March 15, 1962) was dated *May* 15, 1962. Thereafter, on April 10, 1962, a certified copy of the judgment of the Court of Appeals issued to the clerk of the United States District Court at Houston, Texas,

as and for the mandate, with copies of the letter of transmittal being mailed to all counsel of record on the same day, to-wit, April 10, 1962. (See certificate of the Clerk of the United States Court of Appeals for the Fifth Circuit attesting to clerical error, which is Appendix A of this brief in opposition).

The petition for writ of certiorari was filed in this Court on August 13, 1962, more than ninety days after the entry of the order of the Court of Appeals denying petition for rehearing. Indeed, said petition was filed more than ninety days from the date of issuance of the mandate, namely April 10, 1962, and the period for applying for a writ of certiorari has not been extended by a Justice of this Court.

It appears, therefore, that Petitioners' application for a writ of certiorari is out of time and should be denied. *Polleys and others* v. *Black River Imp. Co.* 113 U.S. 81, 5 S. Ct. 369; *Toledo Scale Co.* v. *Computing Scale Co.* 261 U.S. 399, 43 S. Ct. 458; *Commissioner of Internal Revenue* v. *Bedford's Estate*, 325 U.S. 283, 65 S. Ct. 1157; *Federal Trade Commission* v. *Minneapolis-Honeywell Regulator Co.* 344 U.S. 206, 73 S. Ct. 245.

The error of the typist in the office of the Clerk of the Court of Appeals, dating a form letter *May* 15, 1962 instead of *March* 15, 1962, could not disturb or revise the legal rights and obligations which had been plainly and properly settled with finality. Especially is this true in the light of the prompt mailing on *March* 15, 1962 of the notice of denial of the petition for rehearing, and the prompt notification to all parties of the issuance of the mandate on April 10, 1962. See *Link* v. *Wabash Railroad Company*, 82 S. Ct. 1386, 1390-1391 and footnotes contained therein and *Union Nat. Bank of Wichita, Kansas* v. *Lamb*, 337 U.S. 38, 40, 69 S. Ct. 911, 912. Cf. *Boylan et al* v. *U. S.* 257 U.S. 614, 42 S. Ct. 113.

No showing has been made by Petitioners that the decision of the Court of Appeals is in conflict with the decision of any other court, nor has it been demonstrated that there are any matters of public importance involved in the issues decided.

Granting of the writ would not be warranted merely to review the evidence or inferences drawn from it, *Southern Power Co.* v. *North Carolina Pub. Serv. Com.*, 263 U.S. 508, 44 S. Ct. 164, 68 L. Ed. 413; *United States* v. *Johnston*, 268 U.S. 220, 227, 45 S. Ct. 496, 69 L. Ed. 925, and concurrent findings by District Court and Court of Appeals are final on review by the Supreme Court in absence of very exceptional showings of error and will not be disturbed unless plainly without support. *Comstock* v. *Group of Institutional Investors*, 335 U.S. 211, 68 S. Ct. 1454, 92 L. Ed. 1911, *Virginian Ry. Co.* v. *System Federation No. 40*, 300 U.S. 515, 57 S. Ct. 592, 81 L. Ed. 689. Moreover, as the Supreme Court stated in *Skelly Oil Co.* v. *Phillips Petroleum Co.*, 339 U.S. 667 at 674, 70 S. Ct. 876 at 880, ". . . we do not reexamine the local law as applied by the lower courts". And since the findings, in this diversity case, as to the Texas law were made by a federal district judge from the Texas bar (Judge Joe Fisher), and affirmed in an opinion by a Court of Appeals Judge from the Texas Bar (Judge Joseph C. Hutcheson, Jr.), special weight should be given to their statements as to what the Texas law is. *Bernhardt* v. *Polygraphic Company of America*, 350 U.S. 198, 204, 76 S. Ct. 273, 277. See also *Propper* v. *Clark*, 337 U.S. 472, 487, 69 S. Ct. 1333, 1342, 93 L. Ed. 1480; *McGregor* v. *State Mut. Life Assur. Co. of Worcester, Mass.*, 315 U.S. 280, 62 S. Ct. 607, 86 L. Ed. 864. In *MacGregor*, the lower courts had no decision of the state courts upon which to rely in construing the relevant state stautes and none was brought to the attention of this Court. This Court affirmed in a per curiam opinion

and observed: "In the absence of such guidance, we shall leave undisturbed the interpretation placed upon purely local law by a Michigan federal judge of long experience and by three circuit judges whose circuit includes Mishigan". 315 at 281, 62 S. Ct. at 607. See also *U. S.* v. *Durham Lumber Co.*, 363 U.S. 522, 526-527, 80 S. Ct. 1282; 1284.

In the instant case, the lower courts were not without guidance from the decisions of the Texas court, as well a leading case of the Supreme Court of the United States, in concluding that the defense of illegality was not available to deny a partnership accounting to one who had been defrauded by his partner. In upholding the district judge's conclusions, the Court of Appeals held that the suit for an accounting did ". . . not seek to enforce any illegal agreement, and the asserted defense, that the partners were engaged in an illegal transaction and, therefore, the defendant can keep, and cannot be made to disgorge, the fruits of his attempted fraud upon plaintiff, cannot be maintained", 299 F. 2d 434 at 436-437, citing *Brooks* v. *Martin*, 2 Wall. 70, 69 U.S. 732; *Pfeuffer* v. *Malthy*, 54 Tex. 454; *DeLeon* v. *Trevino*, 49 Tex. 88; *Wegner Bros.* v. *E. J. Biering & Co.*, 65 Tex. 506; *Floyd* v. *Patterson*, 72 Tex. 202, 10 S.W. 526; *Hall* v. *Edwards*, Tex. Com. App. 222 S.W. 167; *Lewis* v. *Davis*, 145 Tex. 468, 199 S.W. 2d 146; *Hall* v. *Hall*, Tex. Civ. App. 326 S.W. 2d 594.

Petitioners cite the case of *Wiggins* v. *Bisso*, (Tex. S. Ct.) 47 S.W. 637, in support of their assertion that the defense of illegality could defeat Respondent's claim in a suit for an accounting. Petitioners have misread the case. In *Wiggins*, the contract was *illegal upon its face*. As the Court correctly stated:

> "To give relief to Bisso, the court must examine each of the transactions which the partnership had with the other people under the unlawful agreement entered into with the brewing company, and thus the

> court would be engaged in the examination of the unlawful acts of these parties in order to do equity between them". 47 S.W. at 638.

Citing *DeLeon* v. *Trevino*, (Tex. Sup. Ct.) 49 Tex. 88, and *Brooks* v. *Martin*, 2 Wall. 70, 69 U.S. 732, the court continued:

> "There can be no doubt that where parties have jointly, in the pursuit of an illegal purpose, acquired money, and invested that money in property which is in the possession of one of the joint owners, *such possessor cannot resist the claim of the other on the ground of the illegality of the business in which the money was first acquired*". (emphasis added) 47 S.W. at 639.

As the Supreme Court of Texas later stated in *Pfeuffer* v. *Maltby*, (Tex. Sup. Ct.), 54 Tex. 454, 461:

> "Whether the contract of partnership, at the time it was formed and entered upon by the parties, was illegal and void as against public policy, is not necessarily the controlling question; but *the true inquiry is, whether a party to that contract is liable or not, in an action against him, brought by his former partner, to recover from him his share of the proceeds of the partnership*" (emphasis added).

Similarly, Petitioners' reliance upon *Araiza* v. *Chapa* (Civ. App. 1958), 319 S.W. 2d 742, ref. n.r.e. is misplaced. That was a case where the court was called upon to enforce a contract between partners which was illegal upon its face.

The case of *Lewis* v. *Davis* (Tex. Sup. Ct.) 199 S.W. 2d 146, is in accord with the contentions of Respondent that the defense of illegality is not available to Petitioners. In *Lewis*, the Supreme Court of Texas cited with approval the cases of *Pfeuffer* v. *Maltby*, (Tex. Sup. Ct.) 54 Tex. 454; *DeLeon* v. *Trevino*, (Tex. Sup. Ct.) 49 Tex. 88; and *Brooks* v. *Martin*, 2 Wall. 70, 69 U.S. 732.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that service of the foregoing Brief of Respondent in Opposition was made upon William H. Scott, Jr., 725 Bankers Mortgage Building, Houston 2, Texas, and also upon Ellis F. Morris, American Investors Building, Houston 2, Texas, by depositing the same in the United States Post Office with first class postage prepaid to their said addresses, respectively, this 11th day of September, 1962.

.....

W. Ervin James

APPENDIX A

Title 28, United States Code, Section 2101(c):

(c) Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree. A justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period not exceeding sixty days.

APPENDIX B

CERTIFICATE ATTESTING TO CLERICAL ERROR

I, Edward W. Wadsworth, Clerk of the United States Court of Appeals for the Fifth Circuit, do hereby certify that I am the custodian of the records of said Court and that the following clerical error occurred in the preparation of the routine notice of the Court's order denying petition for rehearing in the case of *L. K. Peterson, et al.* v. *Herbert E. Tharp*, No. CA 18,807.

This Court's judgment in the above case was entered February 1, 1962. Petition for rehearing was timely filed by Appellant and the Court's Order denying said petition for rehearing was duly entered on March 15, 1962. All counsel of record were notified of the entry of said Order by a mimeographed letter which carried a facsimile of the signature of the Clerk. Through inadvertence the date of *May* 15, 1962, was entered on said form notice instead of *March* 15, 1962. I am advised and believe, and therefore allege, that said notices were timely mailed on March 15, 1962. On April 10, 1962, a certified copy of the judgment of this Court issued to the Clerk of the United States District Court at Houston, Texas, as and for the mandate, with copies of the letter of transmittal being mailed to all counsel of record in this cause pursuant to the usual practice on that same day, to-wit, April 10, 1962.

Done this 20th day of August, 1962.

/s/ EDWARD W. WADSWORTH
Edward W. Wadsworth, *Clerk*

Test:

/s/ EDWARD W. WADSWORTH
Edward W. Wadsworth
Clerk, U. S. COURT OF APPEALS,
FIFTH CIRCUIT, NEW ORLEANS,
LOUISIANA

August 20, 1962